No. 79-621

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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On January 7, 1980, the Court invited the views of the Solicitor General concerning this case.

QUESTION PRESENTED

Whether a state may appeal from a post-guilty-verdict judgment of acquittal in a criminal proceeding that was removed by the defendant to federal court pursuant to 28 U.S.C. 1442(a)(1).[1]

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[1]Petitioner has also asked the Court to review the question of whether the district court had jurisdiction to enter a judgment of acquittal on its own motion eleven months after the jury returned a verdict of guilty (Pet. 3-4, 32-37). Because of its finding on the jurisdictional issue, the court of appeals did not reach this issue, and we assume that this Court would not reach it even if it resolves the issue of appellate jurisdiction in petitioner's favor. Accordingly, we do not address it here.

STATEMENT

Respondent was indicted in the Superior Court of Pima County, Arizona, for assault with a deadly weapon, in violation of Ariz. Rev. Stat. Ann. § 13-249(A) and (B) (1976). Because the charge arose from an act that he committed while on duty as a Border Patrol Agent of the United States Immigration and Naturalization Service, respondent removed the case to the United States District Court for the District of Arizona pursuant to 28 U.S.C. 1442(a)(1). The case was tried before a jury, which returned a verdict of guilty.[2] Respondent then moved for arrest of judgment under Rule 34, Fed. R. Crim. P., or alternatively, for a new trial under Rule 33, Fed. R. Crim. P. (Pet. App. 4a). The district court initially granted the motion for arrest of judgment, but on reconsideration it reversed the order arresting judgment (Pet. App. 42a, 57a).[3] However, the court construed respondent's motion as a motion for acquittal under Rule 29(c), Fed. R. Crim. P., and entered a judgment of acquittal because of its

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[2]The evidence at trial showed that respondent encountered three unarmed illegal aliens while he was patrolling an area near the border between Arizona and Mexico. When one of the aliens turned and ran back toward the Mexican border, respondent shot him in the back, severing his spinal cord (Pet. 7-8; Pet. App. 33a-34a).

[3]The district court had found that the State of Arizona had no criminal jurisdiction over the federal land where the event occurred. On reconsideration, the court determined that Arizona did have criminal jurisdiction over the territory in question (Pet. App. 41a-49a).

failure to consider the issue of respondent's immunity as a federal officer carrying out his duties, which the court deemed "fundamental error" (Pet. App. 54a-57a).[4]

Petitioner appealed, invoking 18 U.S.C. 3731 as the basis for appellate jurisdiction.[5] The court of appeals dismissed the appeal for lack of jurisdiction, concluding that petitioner could not appeal from an adverse decision in a criminal case absent express statutory authorization (Pet. App. 3a-14a). The court held that 18 U.S.C. 3731 authorizes appeals only when the federal government is the prosecutor not when a state prosecution is removed to federal court pursuant to 28 U.S.C. 1442(a)(1) (Pet. App. 6a-9a). The court refused to consider whether Arizona law authorized an appeal, concluding that "only Congress can authorize an appeal by a state in a § 1442(a)(1) criminal prosecution" and that Congress has not done so (Pet. App. 9a-11a). Judge Kennedy dissented (Pet. App. 15a-38a).

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[4]Respondent had not raised an immunity defense at trial (Pet. App. 31a). Consequently, petitioner did not introduce evidence designed to overcome such a defense. The district court found, however, that the immunity defense was established (Pet. App. 44a). The court then concluded that it had erred either in failing to determine itself whether respondent honestly believed that his actions were reasonable in discharging his federal duties, or in failing to submit the case to the jury with instructions to decide that issue. It is not evident why this error, if error it was, would justify an acquittal rather than a new trial.

[5]18 U.S.C. 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

DISCUSSION

The decision in this case creates a serious anomaly in the administration of the federal courts. Under this decision, a state may never appeal from an adverse decision in a criminal prosecution that has been removed to federal court under 28 U.S.C. 1442. This is true even in situations where the federal government clearly could appeal under 18 U.S.C. 3731 if it were the prosecutor and where the state could have appealed under state law had the case not been removed to federal court. The court of appeals itself noted that its decision was contrary to the policy of Section 3731 and would have "a substantial effect on the delicate balance of our federal system" (Pet. App. 8a). The court concluded, however, that no statute authorized such an appeal by the state. We submit that the court of appeals was mistaken; either of two statutes authorizes such an appeal.

1. There is no doubt that the language of 28 U.S.C. 1291 authorizes the appeal taken in this case. It provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *." The court of appeals, however, held that this language does not apply to appeals taken by the prosecution in a criminal case (Pet. App. 13a n.3). This is a limitation that is found nowhere in the statute or history of 28 U.S.C. 1291. The source cited for this limitation is *United States* v. *Sanges*, 144 U.S. 310 (1892). That case, however, simply held that, because criminal appeals by the prosecution had historically been expressly authorized by the sovereign, the Court would not read 28 U.S.C. 1291 to authorize an appeal by the *United States* of a criminal case. As the legislative body of the United States, it is for Congress to decide whether, as a policy matter, the United States should be permitted to appeal adverse

decisions in prosecutions. But *Sanges* did not limit the applicability of 28 U.S.C. 1291 to any party other than the United States, such as a criminal defendant or, as here, a state prosecuting a case that has been removed.

Even if *Sanges* can be read to establish the broader proposition that 28 U.S.C. 1291 should not be construed to include any prosecutorial appeals unless Congress indicates a contrary policy, it is clear that Congress has expressed such a policy in the Criminal Appeals Act of 1907 and in the present version of 18 U.S.C. 3731 enacted in 1971. There could be no more emphatic rejection of the rationale underlying *Sanges* than the 1971 version of 18 U.S.C. 3731, which permits appeals of all district court orders dismissing an indictment that are not barred by the Double Jeopardy Clause. This statute clearly represents Congressional recognition that the rights of criminal defendants in this area are adequately protected by the Constitution and a Congressional intent not to interpose statutory barriers to prosecution appeals. See *United States* v. *Wilson*, 420 U.S. 332, 336-339 (1975).[6]

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[6]The practice under 28 U.S.C. 1291 does not restrict its application to civil cases. Criminal defendants appeal from their convictions under 28 U.S.C. 1291. The prosecution may appeal from adverse decisions in cases arising under 28 U.S.C. 2254 and 28 U.S.C. 2255, even though they are criminal in nature. Orders relating to grand jury proceedings have also been held to be appealable under Section 1291. See, *e.g.*, *In re Grand Jury Empanelled February 14, 1978*, 597 F. 2d 851, 857-858 (3d Cir. 1979). Thus it is clear that the limitation on the right to appeal under Section 1291 is only that narrow limitation imposed by *Sanges*. Indeed, this Court has suggested that even the United States may appeal certain orders related to a criminal case under 28 U.S.C. 1291. *Carroll* v. *United States*, 354 U.S. 394, 403 (1957).

To the extent *Sanges* has any continuing vitality, it could only be that 28 U.S.C. 1291 does not authorize a prosecutorial appeal unless the sovereign that is the prosecuting entity affirmatively permits it as a policy matter. For the United States, that policy decision is made by Congress and is embodied in 18 U.S.C. 3731. For a state, that policy decision is made by the state legislature and is expressed in the state law. If *Sanges* limits the scope of 28 U.S.C. 1291 in this fashion, states would not be able to appeal all adverse decisions in cases that have been removed to federal court, but only those that would have been appealable under state law had the case not been removed. In this case, however, it is not necessary to resolve whether 28 U.S.C. 1291 is limited in this fashion because, as the dissent noted (Pet. App. 23a-24a), Arizona law authorizes the appeal that was taken in this case.

Arizona law permits the prosecution to appeal from an "order made after judgment affecting the substantial rights of the state." Ariz. Rev. Stat. Ann. § 13-4032(5) (1978).[7] Respondent suggests that this section would not

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[7]Ariz. Rev. Stat. Ann. § 13-4032 (1978), provides in pertinent part:

An appeal may be taken by the state from:

1. An order quashing an indictment or information or count thereof.

2. An order granting a new trial.

3. An order arresting judgment.

4. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.

5. An order made after judgment affecting the substantial rights of the state.

6. The sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by §13-604 or § 13-701.

7. An order granting a motion to suppress the use of evidence.

apply here because it refers only to "orders," not "judgments" of acquittal (Br. in Opp. 6-7). As the dissent found, however, these two terms are generally synonymous under Arizona law (Pet. App. 37a-38a n.3). Indeed, in a case that seems indistinguishable from the one at bar, the Arizona Supreme Court recently vacated a judgment of acquittal entered after verdict. *State ex rel. Hyder* v. *Superior Court*, No. 14579 (Ariz. Jan. 16, 1980). Moreover, the trial court's action in this case would be subject to appellate review under the Arizona Supreme Court's certiorari powers. Ariz. Rev. Stat. Ann. § 12-2001 (1956). See *State* v. *Allen*, 27 Ariz. App. 577, 557 P. 2d 176 (1976). See also *Arizona ex rel. Dawson* v. *Superior Court*, 112 Ariz. 123, 538 P. 2d 397 (1975); *State* v. *Gradillas*, 25 Ariz. App. 510, 544 P. 2d 1111 (1976).

Denying Arizona a right to appeal that it would have had in its own courts simply because the defendant is a federal officer entitled to remove the prosecution to federal court is a consequence of removal that raises a delicate issue of federalism, particularly when the federal government does have a right to appeal. Yet none of the purposes of the removal statute are advanced by such a rule. The removal statute was intended to safeguard individuals acting under color of federal law from prosecution by the states for acts that may have been performed within the scope of their authority as federal officers. See *Tennessee* v. *Davis*, 100 U.S. 257 (1879); *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932). Its constitutional validity "rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith, due to possible local prejudice, by state prosecutions instituted against federal officers in enforcing such laws." *Maryland* v. *Soper*, 270 U.S. 9, 32 (1926). The statute is also designed

to provide a forum for a defense based on official immunity, free from the possibility of local bias. *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969). The decision of the court of appeals relates to none of these interests; it merely provides a windfall benefit to a defendant who happens to be a federal officer.

2. If Section 1291 is construed not to authorize the appeal taken in this case, the appeal should be permitted under 18 U.S.C. 3731.[8] The legislative history of the Criminal Appeals Act of 1907, the predecessor to the present 18 U.S.C. 3731, is examined in *United States* v. *Sisson*, 399 U.S. 267, 293-296 (1969). Efforts to pass such legislation began in 1892, when the *Sanges* case was decided. The language of the Act does specifically refer to the "United States," but there is nothing in the history of the 1907 Act or the 1971 enactment of Section 3731 that suggests that Congress believed that a distinction should be drawn between federal and state prosecutions. The purpose of the Act was to control the unreviewable power of one district court judge to end a prosecution, a consideration that should apply equally to state or federal prosecutions.[9] See 41 Cong. Rec. 2192 (1907). Congress gave no specific consideration to the right of appeal of a state prosecuting in federal court, although the frequent references in the legislative history to "Government" appeals suggest that Congress would have

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[8]It is apparent that Section 3731 would authorize the appeal if this were a federal prosecution. Appeals of all judgments of acquittal entered under Fed. R. Crim. P. 29(c) are permitted unless they are barred by the Double Jeopardy Clause. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977). It is not contended by respondent or by the court of appeals that this appeal violates the Constitution.

[9]18 U.S.C. 3731 specifically provides that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."

treated the states just as the United States, if Congress had felt that state appeals would be barred unless authorized in Section 3731. See, *e.g.*, S. Rep. No. 1296, 91st Cong., 2d Sess. 2 (1970).

It seems plain that Section 3731, passed in response to the *Sanges* decision, spoke in terms of the "United States" simply because it was appeals by the "United States" that *Sanges* had held not to be authorized by Section 1291 in the absence of a specific enactment by Congress. As we have suggested above, this decision in *Sanges* should not be construed to restrict appeals by states. If the meaning of "United States" in *Sanges* is stretched to include individual states, however, then "United States" in Section 3731 should be given the same construction, and Section 3731 should be held to authorize the appeal here.

3. Cases might arise in which a state seeks to appeal an order in a removed case that would not have been appealable by the United States under Section 3731. In such an instance, the existence of appellate jurisdiction might turn upon whether the state's right to appeal is found in Section 1291 or Section 3731. Similarly, cases might arise in which the challenged order would not have been reviewable in a state appellate court at the prosecution's behest, but would be reviewable in a federal appellate court upon appeal by the United States in a federal prosecution. Such a case would also present difficult problems regarding the scope of these two provisions.

In the instant case, however, it is clear that the United States could have appealed the judgment of acquittal had this been a federal prosecution and that the Arizona courts would have had jurisdiction to entertain the State's appeal had the case not been removed, and had a similar

order been entered by a state trial judge. Since the existence and scope of the appellate jurisdiction is not affected by the question whether the appeal lies under Section 1291 or Section 3731, there is no occasion in this case to address any of the questions outlined above, which could be dispositive only in other, hypothetical cases not before the Court. That the State of Arizona had a right to appeal in this case seems to us clear, and the court of appeals should accordingly have entertained its appeal on the merits.

CONCLUSION

The issue presented in this case is one that is not likely to recur with great frequency. However, the question of the status of a state when a prosecution has been removed from its courts to the federal courts is one that does implicate serious federalism concerns that go beyond the specifics of this case. In view of the serious anomaly created by this decision, it is our view that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

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